Filed 5/18/09 P. v. Khun CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DARA KHUN,<br><br>Defendant and Appellant. | C058566<br><br>(Super. Ct. No. SF103343A) |

As a result of an intra-Crip gang fight--two Crip gangs against another Crip gang, defendant Dara Khun was convicted of voluntary manslaughter as a lesser included offense of murder. (Pen. Code, § 192. subd. (a).)[1] The jury found the special circumstance allegation that defendant committed the offense for the benefit of a criminal street gang to be not true.

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[1] Hereafter, undesignated statutory references are to the Penal Code.

(§ 186.22, subd. (b)(1).) The jury convicted defendant of carrying a concealed firearm as a gang member (§ 12025, subd. (b)(3)), carrying a loaded firearm as a gang member (§ 12031, subd. (a)(2)(C)), and active participation in a criminal street gang. (§ 186.22, subd. (a).)

The trial court sentenced defendant to the upper term of 11 years in state prison for his conviction of voluntary manslaughter. The trial court imposed a consecutive eight-month (one-third of the middle term) prison sentence for each of defendant's other three convictions, but stayed the term imposed for the violation of section 12031, subdivision (a)(2)(C), pursuant to section 654. The total unstayed prison sentence imposed was 12 years and four months.[2]

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[2] In sentencing, the trial court erroneously referred to count 2 as possession of a loaded firearm. Defendant was convicted in count 2 of carrying a concealed firearm as a gang member in violation of section 12025, subdivision (b)(3). The trial court correctly referred to count 3 as the violation of section 12031 (carrying a loaded firearm). The trial court stayed only count 3 pending finality of the judgment on count 2. The total prison term imposed by the trial court was 12 years and four months.

As respondent notes, the minute order of the proceedings erroneously reflects the trial court stayed the sentence on both counts 2 and 3. It is not clear from the copy of the clerk's minutes in the record on appeal what counts were stayed, but the minutes erroneously reflect a stay pending finality of the judgment as to count 1, the voluntary manslaughter count. The abstract of judgment erroneously reflects the stay of both counts 2 and 3 and a resulting total prison term of 11 years and eight months.

On appeal defendant claims the trial court erred in admitting evidence of rap lyrics he wrote and erred in imposing the upper term sentence based on his prior juvenile adjudications in violation of *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We shall affirm the judgment.

**FACTUAL BACKGROUND**

Sobain Seng rented a portion of a restaurant in Stockton in January 2007 for his 18th birthday party. Seng invited more than a hundred people, but considered it an "open" party. Seng's invited guests could get in for free; others were required to pay a $3 fee. Seng did not intend the party to be a gangster party, but gang members of the Loc Town Crips (LTC), Asian Boys (ABZ), and Badland Boyz (BLB) came to the party. Although the LTC, ABZ, and BLB gangs are all Crip gangs, the LTC did not get along with the BLB at this time. ABZ associates with LTC and they back each other up.

About an hour or two into the party, a Cambodian man, followed by two other people, walked into the dance area of the restaurant. The first man made the "A" hand sign of the ABZ and

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We shall order the trial court to correct its records and prepare an amended abstract of judgment reflecting the stay of only count 3 pending finality of the judgment on count 2, resulting in a total unstayed prison sentence of 12 years and four months.

"mean mugged" (stared disrespectfully at) a group of partygoers that included BLB members and associates of BLB. Subsequently, a BLB member and an ABZ member argued and a fight involving five to ten people broke out between the rival Crip gangs. Defendant, a LTC member, was fighting in the middle of the group. One of the men fighting on the ABZ/LTC side, who was standing next to defendant, saw defendant get punched and fall down. He saw defendant get up, pull out a gun, point it at a person and fire a shot. The 17-year-old victim received a gunshot wound to his head. A crowd of people, including defendant, ran out the front door of the restaurant. The victim was taken to the hospital where he died.

Stockton police interviewed defendant in February 2007. Defendant stated he was documented as a LTC member about two years prior to the shooting, but he "was staying away from it" and had stopped hanging with them the prior year. Defendant had a tattoo of "38" on his upper left arm, a "30" on his upper right arm, "Oak Park" on his lower right leg, and "Locster" on his lower left leg. Locster is a nickname for LTC and Oak Park is a known hangout for the LTC. The area of 3830 Alvarado is affiliated with the LTC and ABZ gangs. Defendant told the interviewing officer he got the tattoos on his legs the prior year but denied he still hung out with the LTC. He admitted not getting along with the BLB.

Defendant claimed he heard one gunshot at the party and did not see the shooter. Later defendant admitted bringing a gun to the party, which he claimed to have pulled out after he heard the gunshot. Defendant held the gun to his side and then fired the gun once into the roof "just to scare him." When the interviewing officer told defendant that there was only one shooter, defendant then claimed the shooting was an accident. Defendant claimed he pulled the gun out, stuck out his arm and pointed the gun. When someone hit his hand, the gun fired. He put the gun back in his pocket and ran.

At trial, however, defendant testified he was fighting at the party when he heard a gunshot coming from next to him. Defendant turned and saw someone with the gun. Defendant grabbed the gun out of the person's hand, ran outside and went home. The defense presented testimony of a partygoer who identified another person as the shooter.

Stockton Police Officer Paul Gutierrez testified as an expert on Asian criminal street gangs. Gutierrez opined that LTC and ABZ are criminal street gangs within the meaning of section 186.22, subdivision (f).

Stockton police officers saw defendant hanging out with other men at known hangouts for LTC or Asian gangs in 2004. Defendant was in a stolen vehicle with LTC members in May of 2004. In 2004 defendant's mother expressed concern to police about defendant's gang involvement. Defendant was seen with a

known LTC gang member in April 2005. A shoe box containing gang taggings and gang writings was found during a probation search of defendant's residence in 2005. Defendant was seen with LTC gang members in January 2006. Defendant admitted to police he was a LTC gang member in November 2006. Defendant signed text messages to his girlfriend with "38.biGbLoCc.30[,]" a gang reference. Defendant told his girlfriend he was a LTC gang member.

In places where defendant stayed, his mother's apartment, his grandmother's home, and in his car, law enforcement found numerous gang-related items (clothing, photographs, CD's, various writings and rap lyrics). Photographs and gang references were found on defendant's computer. A gang expert opined defendant was a member of LTC and nothing indicated defendant had ceased his membership. Based on a hypothetical paralleling the facts in this case, the expert opined the crimes were committed for the benefit of a criminal street gang.

## DISCUSSION

## The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Of Rap Lyrics Written by Defendant

### A. Evidence Code Sections 352 and 1101

Defendant claims the trial court erred in admitting evidence of his rap lyrics over his objection pursuant to

Evidence Code section 352 (section 352).[3] He claims the evidence was cumulative, of questionable probative value, and so

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[3] The lyrics were transcribed as follows: "I be that nigga C-1 banging LTC, flashing that blue rag hanging from the back side, nina on my waist, just in case nigga approach. Getting ready to pull the trigger taking nigga life away. I'm uh type of nigga that puts slugs threw your chest. Fuck your bullet proof vest. You are the victim for tonight. Stay out of my sight foe. I have to take flight. See me in the street. Nigga feared of me. See the fear in their eyes. Look like they bota cry. Beggin foe they life. No love foe these hoes haters running their mouth like they're running the show. But you ain't running shit but my nut in your mouth. Just shut up and run up foe you get done up. Fake muther fucker bow down. Bow down to a boss. Bow down to a G. Bow down to a locster foe you get killed. [¶] Make yah nigga bow down then pistol whip ur ass, put holes in your chest."

"People be running and people be hiding. Too must fist and bullets are flying. People are crying and people are dying to many stress in this pitiful world. I wonder why we have to live this way. I wish there was another way. To live a life of paradise day by day. My heart is finding a way, searching for a better so far way. So I won't feel pain but the pain regain. And it hurt so bad sometime I feel like I want to die because I'm tired from all those tears falling from my eye. I'm tired for losing the one that we love as life goes on. I got to stay strong."

"Fake bitches bow down when I come threw."

"Fake mother fuccer talk the talk but never walk the walk. Yah bitches running your mouth like u running the show, but u ain't running shit but these nuts in ur mouth bitches. Shut up and run up foe u get dun up cuz u noe that yah fake mother fuccer aint gonna do shit. Bowing down to us cuz were the king of the game. My bulit be like poring rain. Yah bitches gonna feel the rain. Step the fucc off the battle feil foe you get kill. Fake mother fuccer act up when they deep catch ur ass one on one. Yah mother fuccer bow down like a little bitch u iz. Nigga thought was something to me, ain't nothing to me. Ah locster cuz u noe we big block competition, that's wat we is. Nigga thought I was getting threw with yah but I din't even get started yet. I aint's gonna stop till yah get put to rest. Rest in pain mother fuccer."

inflammatory as to be unduly prejudicial. He claims it was used as propensity evidence in violation of Evidence Code section 1101 (section 1101) and his right to due process. Applying the required deferential abuse of discretion standard to the trial court's ruling under section 352 (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121), we conclude there was no error.

In fact, we find this case is quite similar to *People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35, in which we recently rejected a similar claim of section 352 error in the introduction of rap lyrics in a gang murder case. We found in *Zepeda* that the trial court did not abuse its discretion under section 352 because "[t]he evidence was probative of defendant's state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it." (*People v. Zepeda, supra,* at p. 35.) The evidence "showed that defendant's gang had the motive and intent to kill" rival gang members. (*Ibid.*) We rejected the defendant's claims of undue prejudice because the evidence "provided noncumulative evidence of defendant's state of mind and his gang association, differing in context

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"Yah nigga thought yah waz ready foe us mother fuccer. Yah nigga getting ready to bow down. Bow down to a locster. Bow down to a boss. Bow down to me when I come threw all nite and day. All I thinkn about iz pullin this trigger, laying yah mother fuccer 6 feet deep. Bow down bitch or catch your ass in ah casket. These are the only option u have, mother fuccer better play it rite. Think twice. Don't make the wrong choice foe I take your life away. That's when u could say I'm threw with you. But just getting started with ur crew. Leave yah mother fuccer clue less cuz am roff less."

from his tattoos, drawings, notebooks, and pictures of himself flashing gang signs. The language and substance of the lyrics, although graphic, did not rise to the level of evoking an emotional bias against defendant as an individual apart from what the facts proved." (*Ibid.*)

Similarly here, the trial court did not abuse its discretion in finding the probative value of the lyrics to be "extremely high." The lyrics written by defendant and found in a folder he apparently used for school supported the evidence of his current status as a member of the LTC gang, a disputed issue at trial. The evidence reflected the extent of defendant's commitment and loyalty to the LTC gang.

Moreover, defendant was being tried for murder with a special circumstance allegation that the murder was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) To establish this gang allegation, it was necessary for the prosecution to show that defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (*Ibid.*) The lyrics written by defendant were particularly relevant to circumstantially show his motive and intent in participating in gang-related actions. The jury could infer an intent to kill and an intent to promote, further or assist the LTC from such lyrics as: "I be that nigga C-1 banging LTC, flashing that blue rag hanging from the back side,

nina on my waist[.]"[4] "Getting ready to pull the trigger taking nigga life away." "Bow down to a locster foe you get killed." "Bowing down to us cuz were the king of the game. My bulit be like poring rain." "I aint's gonna stop till yah get put to rest. Rest in pain mother fuccer." "All I thinkn about iz pullin this trigger, laying yah mother fuccer 6 feet deep." Section 1101, subdivision (b), specifically provides for the admission of evidence of a defendant's other acts when relevant to prove his intent. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 22-23; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

Contrary to defendant's claim, the lyrics were not cumulative evidence to the rest of the evidence regarding defendant's membership in the LTC. The evidence of defendant's association with other gang members, his tattoos, his possession of gang-related clothing, photographs, CDs, and writings, and his use of gang references all reflected defendant's close identification with the LTC gang, but the language of the lyrics provided a specific insight into defendant's mental state.[5]

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[4] The prosecution's gang expert testified "nina" referred to a nine-millimeter gun.

[5] The prosecution argued the lyrics showed the "mentality" of defendant and the LTC. We do not view "mentality" as another word for propensity, as defendant suggests. The term is reasonably understood to refer to the mental state of defendant and the other LTC gang members.

In arguing the cumulative aspect of section 352, defendant cites us to *People v. Leon* (2008) 161 Cal.App.4th 149. In *Leon* the reviewing court concluded the admission of Leon's prior juvenile robbery adjudication to prove his gang membership was error because it was cumulative to other overwhelming evidence. (*Id.* at p. 169.) *Leon* is distinguishable from this case. In *Leon* the juvenile adjudication was admitted for the same purpose as other already overwhelming evidence. (*Ibid.*) Here, defendant's rap lyrics provided evidence of defendant's intent and mental state relevant to the open count of murder and special circumstance allegation that the general evidence of his gang membership did not provide.

Nor do we find the trial court abused its discretion in its assessment of the prejudicial impact of this evidence. The lyrics are offensive and reflect a violent attitude, but we cannot say that any potential prejudice they may produce outweighs their considerable probative value on defendant's intent to kill in furtherance of his gang. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.)

Finally, even if we were to conclude the evidence should have been excluded under section 352, we would find no prejudice to defendant from its admission in light of the jury's rejection of the murder charge in favor of a verdict of voluntary manslaughter and its finding that the gang special circumstance was untrue. It is not reasonably probable defendant would have

obtained a more favorable result if the rap lyrics had been excluded. (Evid. Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

**B. First Amendment Claim**

Defendant did not object below that introduction of his rap lyrics violated his First Amendment rights, but he now claims the use of this evidence penalized his exercise of artistic speech.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731 [123 L.Ed.2d 508, 517], quoted with approval by *People v. Saunders* (1993) 5 Cal.4th 580, 590.)

Defendant seeks to avoid forfeiture by arguing he did not fail to object; rather he made "an imperfect objection not raising this particular aspect of the issues." We disagree.

"[A] trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may not argue on appeal that the court should have

excluded the evidence for a reason not asserted at trial. A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 431.)

Here defendant objected to this evidence on the sole ground that its probative value was outweighed by its potential prejudicial impact so as to require its exclusion under section 352. Defendant did not raise any First Amendment claim. He may not argue that claim now on appeal.

**II.**

**Upper Term Sentence For Voluntary Manslaughter**

Citing to *Cunningham, supra,* 549 U.S. 270 [166 L.Ed.2d 856] and *Blakely, supra,* 542 U.S. 296 [159 L.Ed.2d 403], defendant claims the trial court violated his federal constitutional rights when it imposed on him an upper term sentence for voluntary manslaughter. Not so.

Defendant was sentenced on March 17, 2008, almost a year after the effective date of the amendment of section 1170 by Senate Bill No. 40 (2007-2008 Reg. Sess.). (Stats. 2007, ch. 3, § 2.) The court reviewed the probation report on the record in some detail and heard from the victim's family. The trial court then sentenced defendant to the upper term for manslaughter "looking at all of the factors," an apparent reference to the multiple factors in aggravation identified by the probation

report even after the court struck the circumstance that defendant induced a minor to commit or assist in the commission of the crime. Such factors included not only defendant's prior juvenile adjudications, but, among other things, his unsatisfactory prior performance on probation and the fact he was on probation when the crime was committed.

The trial court's sentencing in compliance with section 1170, subdivision (b), did not violate defendant's federal constitutional rights under *Cunningham* and *Blakely*. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

**DISPOSITION**

The judgment is affirmed. The trial court is directed to correct its records as discussed in this opinion at footnote 2 and to prepare an amended abstract of judgment reflecting the stay of only count 3 pending finality of the judgment on count 2, resulting in a total unstayed prison sentence of 12 years and four months. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.